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MEXALAND DEVELOPMENT SDN BHD & ANOR

v.

SCORE OPTION SDN BHD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S3-22-496-2007]
11 JULY 2007

C ***LAND LAW:*** *Caveat - Private caveat - Application to extend caveat - National Land Code, s. 326(2) - Whether application should have been made inter parte - Whether plaintiff had caveatable interest - National Land Code, ss. 322(2) & (3), 323(1)*

D This was an application by the first plaintiff by way of an *ex parte* summons in chambers pursuant to s. 326(2) of the National Land Code for an order that a private caveat entered by the first plaintiff in respect of land belonging to the first defendant be extended until the settlement or final determination of this suit. The first plaintiff, the first defendant and the second defendant
E were parties to the joint-venture cum project management agreement ('JV agreement') under which the first defendant as the landowner and the second defendant as the developer have jointly agreed to appoint the first plaintiff as the project manager to
F manage the development of the land. The first plaintiff had entered the caveat pursuant to a clause (cl. 6) of the JV agreement. As a result of a dispute between the plaintiffs and the defendants, the plaintiffs had taken out a writ action against the defendants alleging breach of the JV agreement by the first and
G second defendants seeking a declaration that any contract entered into between the first, second and third defendants relating to the said land defendant was void. There was also a claim for specific performance of the JV agreement. Meanwhile, the first defendant had taken steps to have the caveat removed. On 21 May 2007,
H the District Land Administrator had served on the first plaintiff a Form 19C notice pursuant to s. 326(1A) of the National Land Code, notifying the first plaintiff of the registrar's intention to remove the caveat within two months of the service of the said notice – unless the life of the caveat was extended by an order of
I the court. As a consequence, the first plaintiff filed the present summons in chambers with a view to obtaining the court order.

Held (dismissing the application):

(1) As a rule the application must be made *inter parte* and not *ex parte*. It was only in exceptional cases that he can make the application *ex parte* (s. 326(1B) and (2) of the National Land Code). It would not be fair to the registered landowner/caveatee if the application to extend the caveat were to be made without his knowledge; when in the first place it was he who had applied to the land administrator/registrar for the caveat to be removed. The caveat, as long as it existed, affected his rights in dealing with his land (s. 322(2) and (3) of the National Land Code). There was no explanation or justification as to why the application had to be made *ex parte* (instead of *inter parte*).

(2) The first plaintiff had no caveatable interest. The JV agreement and in particular cl. 6 did not vest the plaintiff with any caveatable interest so as to entitle the first plaintiff to register the caveat. Under the National Land Code, whether or not the first plaintiff had any caveatable interest must be determined with reference to s. 323(1)(a), (b) or (c) of the Code. By merely placing reliance on the JV agreement and cl. 6(1), this alone did not bring the first plaintiff into any of the classes of persons specified in the said s. 323(1).

Legislation referred to:

National Land Code, ss. 322(2), (3), 323(1)(a), (b), (c), 326(1A), (2), 326(1B), (1)

For the plaintiffs - Rusdi Ishak (Bruce Lim with him); M/s Lim & Yeoh

Reported by Suhainah Wahiduddin

JUDGMENT

Hishamudin Yunus J:

[1] This is an application by the 1st plaintiff (Mexaland Development Sdn Bhd) by way of an *ex parte* summons in chambers (encl. 14) pursuant to s. 326(2) of the National Land Code 1965 for an order that a private caveat Presentation No. 831/2007 entered by the 1st plaintiff on 10 January 2007 in respect of land title held under H. S. (D) 112510, PT No. 2063, Mukim and District of Petaling, Selangor, belonging to the 1st

defendant (Score Option Sdn Bhd) be extended until the settlement or final determination of this suit, or until such period this court deems fit.

[2] The present *ex parte* summons in chambers was filed on 2 July 2007 with a certificate of urgency. I heard this *ex parte* summons in chambers on 11 July 2007 and, after considering the written submission of counsel, had dismissed the application on 16 July 2007. The reason for the dismissal was that, firstly, the application should not have been made by way of an *ex parte* application: it should have been *inter parte*; and, secondly, the applicant/1st plaintiff does not have a caveatable interest.

[3] The 1st plaintiff had entered the caveat pursuant to a clause (cl. 6) of a joint-venture cum project management agreement ('the JV agreement') dated 22 February 2006. The 1st plaintiff, the 1st defendant and the 2nd defendant are parties to the JV agreement. Under this JV agreement the 1st defendant as the landowner and the 2nd defendant as the developer have jointly agreed to appoint the 1st plaintiff as the project manager to manage the development of the land.

[3] The 1st plaintiff, pursuant to cl. 6.1 of the JV agreement, entered the caveat on 10 January 2007. Clause 6.1 reads:

> 6.1 The Project Manager shall be entitled at the Project Manager's own costs and expenses to present and register a private caveat against the said Land binding only on the Project Land for the purposes of protecting the Project Manager's interest in the Project Land arising from this Agreement prior to the completion or lawful termination of this Agreement Provided That …

[5] As a result of a dispute between the plaintiffs and the defendants, on 16 May 2007, the plaintiffs took out a writ action (that is, the present action) against the defendants alleging breach of the JV agreement by the 1st and 2nd defendants and seeking a declaration that any contract entered into between the 1st, 2nd and 3rd defendants relating to the said land defendant is void. There is also a claim for the specific performance of the JV agreement.

[6] Meanwhile, the 1st defendant took steps to have the caveat removed. On 21 May 2007 the District Land Administrator served on the 1st plaintiff a Form 19C notice pursuant to s. 326(1A) of the National Land Code, notifying the 1st plaintiff of the

registrar's intention to remove the caveat within two months of the service of the said notice – unless the life of the caveat is extended by an order of the court. As a consequence, the 1st plaintiff filed the present summons in chambers on 2 July 2007 with a view to obtaining the court order.

[7] Subsections (1B) and (2) of s. 326 of the National Land Code 1965 states:

> (1B) In the case in which a notice of intended removal in Form 19C has been served under subsection (1A), the caveat shall lapse and be of no effect at the expiry of two months specified in the notice unless before the expiry of that period the Registrar shall have been served with an order of the Court extending the time provided in the said notice.
>
> (2) The Court may, on the application of any person or body on whom such a notice has been served under subsection (1A) (and acting, if the circumstances so require, *ex parte*), from time to time extend the said period of two months; and the Registrar, on being duly served with an order of the Court under this subsection, shall make an endorsement on the register document of title of the date of service on him of the order and of the period of the extension, and shall sign and seal the endorsement.

[8] My interpretation of the above provisions is that, as a rule, the application must be made *inter parte* and not *ex parte*. The words in brackets:

> (and acting, if the circumstances so require, *ex parte*),

in the above section, mean that only if the circumstances so require could the application be made *ex parte*. This implies that as a rule the application must be made *inter parte* and not *ex parte*. The applicant/caveator does not have a freedom of choice whether to proceed *inter parte* or *ex parte*. It is only in exceptional cases that he can make the application *ex parte*. This has to be the interpretation, for it would not be fair to the registered landowner/caveatee if the application to extend the caveat were to be made without his knowledge; when in the first place it was he who had applied to the Land Administrator/Registrar (*via* s. 326(1) and Form 19H of the National Land Code) for the caveat to be removed. The caveat, as long as it exists, affects his rights in dealing with his land (see s. 322, subsections (2) and (3) of the National Land Code). Under s. 326 the applicant/caveator has

two months to make the application to the court. Thus there is ample time given to him to take the necessary step to extend the life of his caveat.

[9] And when the caveator makes the application *ex parte*, instead of *inter parte*, he must explain his justification for doing so. It is mandatory for him to do so. The legal and evidential burden is on him. This is required by subsection (2) of s. 326, in particular, by the words:

> if the circumstances so require

[10] Therefore, in the application that is now before me, the question arises: Do the circumstances require the application by the 1st plaintiff to be made *ex parte*? I have examined the affidavit but I fail to find anywhere in the affidavit averments to explain and to justify as to why the application had to be made *ex parte* (instead of *inter parte*). Instead, what I do find is that the 1st plaintiff/applicant has had sufficient time to make the application *inter parte* after it was served with Form 19C on 21 May 2007.

[11] Secondly, it is clear to me that on the facts of the present case the 1st plaintiff has no caveatable interest. The JV agreement and, in particular, cl. 6 does not vest the plaintiff with any caveatable interest so as to entitle the 1st plaintiff to register the caveat. Under the National Land Code, whether or not the 1st plaintiff has any caveatable must be determined with reference to s. 323 (1)(a),(b) or (c) of the Code. This provision stipulates:

> **323. Applications for entry of private caveats**
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> (1) The persons and bodies at whose instance a private caveat may be entered are:
>
> (a) any person or body claiming title to, or any registrable interest in, any alienated land or undivided share in any alienated land or any right to such title or interest;
>
> (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
>
> (c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

[12] By merely placing reliance on the JV agreement and clause 6.1, this alone does not bring the 1st plaintiff into any of the classes of persons specified in the said s. 323(1).